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CHARLES ELMORE

# In the Supreme Court of the United States

OCTOBER TERM, 1928.

THE STATE OF OHIO on the relation of John C. Popovici, Vice-Consul of Roumania,

*Petitioner,*

vs.

ABRAM W. AGLER, CHARLES KRICHBAUM AND EDWIN W. DIEHL, Judges of the Court of Common Pleas of Stark County, Ohio,

*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI, and BRIEF IN SUPPORT OF PETITION.

MALCOLM Y. YOST,
SQUIRE, SANDERS & DEMPSEY,
ATLEE POMERENE,
FRANK HARRISON,

*Counsel for Petitioners.*

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vs.

ABRAM W. AGLER, CHARLES KRICHBAUM AND EDWIN W. DIEHL, Judges of the Court of Common Pleas of Stark County, Ohio,

*Respondents.*

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## PETITION FOR WRIT OF CERTIORARI.

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The petition of the State of Ohio on the relation of John C. Popovici, Vice-Consul of Roumania, for a writ of certiorari directed to the Supreme Court of the State of Ohio to bring before this Honorable Supreme Court of the United States the case of:

The State of Ohio ex rel. John C. Popovici,
Vice-Consul of Roumania,
*Petitioner,*

vs.

Abram W. Agler, Charles Krichbaum and Edwin W. Diehl, Judges of the Court of Common Pleas, of Stark County, Ohio,
*Respondents.*

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No. 21357, in prohibition, on the docket of said Supreme Court of Ohio.

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*To the Honorable the Supreme Court of the United States:*

Your petitioner, The State of Ohio, on the relation of John C. Popovici, Vice-Consul of Roumania (hereinafter called the "Vice-Consul") hereby prays for a writ of certiorari directed to The Supreme Court of the State of Ohio to review the final order and judgment of said court in said cause, entered on the 26th day of December, 1928.

**SUMMARY STATEMENT OF THE MATTER INVOLVED.**

In support of this petition, your petitioner respectfully represents and shows the Court:

1. That this is a suit in prohibition begun by the petitioner filing a petition in the Supreme Court of Ohio on the 22nd day of September, 1928, praying for a writ of prohibition from said court to prohibit and restrain respondents from issuing or enforcing any judgment, decree or order, or from exercising any jurisdiction in a certain action for divorce and alimony brought against the Vice-Consul by Helen Popovici, in the Court of Common Pleas

of Stark County, Ohio, said respondents being the judges of said court (R. 3).

2. The grounds upon which the writ of prohibition was demanded were as follows:

A. The facts set forth in said petition were briefly that petitioner is Vice-Consul of the Kingdom of Roumania, having been duly and regularly appointed to said office by the Kingdom of Roumania, and having been recognized and accepted by the United States Government as Vice-Consul of Roumania, and being stationed at Cleveland, Ohio; that petitioner is an alien and citizen of Roumania; that on May 26, 1927, petitioner was summoned to answer the action of Helen Popovici, brought against him in the Court of Common Pleas of Stark County, Ohio; that said action was a suit for divorce and alimony; that petitioner always objected to, and denied the jurisdiction of said Common Pleas Court of Stark County, in said action (R. 4).

B. Petitioner further alleged in his petition that said Common Pleas Court had no jurisdiction of said cause by reason of Article III, Section 2, of the Constitution of the United States, as follows (R. 4):

> "The judicial power shall extend to all cases in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority: *to all cases affecting ambassadors, other public ministers, and consuls*: * * *."

and by reason of Section 256, paragraph 8 of the United States Judicial Code; Section 1233, U. S. Compiled Statutes of 1918, as amended March 3, 1911; United States Code, Title 28, Section 371, as follows:

"The jurisdiction vested in the Courts of the United States in the cases and proceedings hereinafter mentioned, *shall be exclusive* of the Courts of the several states. * * *

(8) In *all* suits and proceedings against ambassadors, or other public ministers, or their domestics or domestic servants, or *against consuls or vice-consuls.*"

C. Petitioner further sets forth in his petition that said Common Pleas Court overruled his objection to its jurisdiction and proceeded to enter a judgment for temporary alimony against him, and unless prohibited therefrom, will restrain petitioner of his liberty and jail him in contempt proceedings for non-payment of alimony, although said Court had and has no jurisdiction whatever of petitioner, and all of its orders and judgments are null and void (R. 5).

3. Respondents filed a general demurrer to said petition for a writ of prohibition, alleging that (a) said petition does not state facts sufficient to constitute a cause of action, (b) that said petition does not set up facts sufficient to entitle plaintiff to the writ prayed for, (c) that the petition is wholly insufficient in law to justify the court to entertain, hear, try, and determine the matter involved (R. 7).

4. The Supreme Court of Ohio, on the 26th day of December, 1928, sustained the demurrer of respondents to said petition and denied the writ of prohibition (R. 14).

5. The grounds upon which this decision of the Supreme Court of Ohio was based were purely legal. The Supreme Court of Ohio based its decision solely upon an interpretation of Article III, Section 2 of the Constitution of the United States, and Section 256, paragraph 8 of the United States Judicial Code contrary to the contentions of petitioner. No question was raised by the Supreme Court

of Ohio as to the remedy or the right of petitioner to have a writ of prohibition in this action, should said Common Pleas Court be without jurisdiction. (Supreme Court of Ohio, Opinion, R. 8 to 14.)

**REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.**

1. Said Supreme Court of Ohio, the highest court thereof, has decided and determined a federal question of substance, that the state courts of Ohio have jurisdiction of actions for divorce against vice-consuls of foreign sovereigns resident in Ohio, contrary to the express exclusion of such actions from the jurisdiction of state courts by Section 256, paragraph 8 of the United States Judicial Code, in a way not in accord with the applicable decisions of this Court.

2. Said Supreme Court of Ohio has interpreted Section 256, paragraph 8 of the United States Judicial Code contrary to Article III, Section 2 of the Constitution of the United States and law.

3. Said Supreme Court of Ohio has interpreted a United States statute (Section 256, paragraph 8 of the United States Judicial Code) directly contrary to the interpretation of the same by the courts of two other states (New York and Pennsylvania).

4. Your petitioner specially set up and claimed in said action in said Supreme Court of Ohio a right, privilege and immunity under the Constitution and the statutes of the United States, which was denied him by said court. (Section 237 (b) of the United States Judicial Code.)

5. Unless this petition is granted, the Vice-Consul is threatened with contempt proceedings in said Common Pleas Court for refusing to recognize the jurisdiction of said court and is in danger of being restrained of his

liberty contrary to the Constitution and statutes of the United States.

6. Said Supreme Court of Ohio has erred in this action and a situation of great public interest has been created.

**PRAYER.**

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Supreme Court of the State of Ohio, commanding that court to certify and send to this Court for its review and determination on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket No. 21357, the State of Ohio on the relation of John C. Popovici, Vice-Consul of Roumania, petitioner, vs. Abram W. Agler, Charles Krichbaum and Edwin W. Diehl, Judges of the Court of Common Pleas of Stark County, Ohio, respondents, and that said order and judgment of the Supreme Court of the State of Ohio may be reversed by this Honorable Court and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

STATE OF OHIO ON THE RELATION OF
JOHN C. POPOVICI,

By MALCOLM Y. YOST,
SQUIRE, SANDERS & DEMPSEY,
ATLEE POMERENE,
FRANK HARRISON,
*Counsel for Petitioner.*

We hereby certify that we have examined the foregoing petition and that in our opinion it is well founded and one in which the prayer of the petitioner should be granted by this Court.

MALCOLM Y. YOST,
ATLEE POMERENE,
FRANK HARRISON,
*Of Counsel for Petitioner.*

No. .....

# In the Supreme Court of the United States

OCTOBER TERM, 1928.

THE STATE OF OHIO on the relation of John C. Popovici, Vice-Consul of Roumania,

*Petitioner,*

vs.

ABRAM W. AGLER, CHARLES KRICHBAUM AND EDWIN W. DIEHL, Judges of the Court of Common Pleas of Stark County, Ohio,

*Respondents.*

## BRIEF IN SUPPORT OF FOREGOING PETITION FOR WRIT OF CERTIORARI.

### THE OPINION OF THE SUPREME COURT OF OHIO.

The opinion of the Supreme Court of Ohio has not been officially reported but is dated December 26th, 1928, and it is quoted in full in the record filed herewith at pages 8 to 14.

### JURISDICTION OF THIS COURT.

The date of the order and judgment to be reviewed is December 26, 1928 (R. 8).

Petitioner claimed in the proceeding in the Supreme Court of Ohio that under Article III, Section 2 of the Constitution of the United States and Section 256, Paragraph 8 of the United States Judicial Code, the respond-

ents, judges of the Court of Common Pleas of Stark County, Ohio, had no jurisdiction to entertain the suit of Helen Popovici against petitioner for divorce, or to order petitioner to pay said Helen Popovici temporary alimony, as said Court of Common Pleas had assumed and had proceeded to do and order (R. 4). The reason given in the opinion of the Supreme Court of Ohio for overruling the claim of petitioner and sustaining the demurrer of the respondents was that there should be read into Section 256 of the United States Judicial Code by interpretation, a provision that if no remedy existed in the federal courts, the state courts should have jurisdiction (R. 14). The opinion finds that no remedy in the federal courts exists and that it is proper to interpret a United States statute as aforesaid (R. 14).

The jurisdiction of this Court is invoked under the provisions of Section 237 (b) of the United States Judicial Code, as amended by the Act of February 13th, 1925, 43 Stats., 938.

The right of the Supreme Court to grant this petition and to issue the writ of certiorari prayed for is so plain, that we cite but a few applicable decisions.

*Weston v. City Council,* 2 Pet. 449 (1829);
*Davis v. Packard,* 8 Pet. 312 (1834);
*Duck Co. v. Power Co.,* 240 U. S. 30 (1916);
*Railroad Co. v. Railroad Com.,* 240 U. S. 564 (1916);
*Missouri v. Taylor,* 266 U. S. 200 (1924).

## STATEMENT OF THE CASE.

A full statement of the case has been given in the petition and, in the interest of brevity, the statement is not repeated at this point. (See pp. 2 to 6, *supra.*)

## SPECIFICATION OF ERRORS.

The petitioner intends to urge the following errors of the Supreme Court of Ohio, and the following grounds for reversing the order and judgment of the Supreme Court of Ohio:

1. The Supreme Court of Ohio erred in finding and holding that the Court of Common Pleas of Stark County, Ohio, has, or at any time had, jurisdiction to entertain the suit of Helen Popovici against the Vice-Consul for divorce and alimony, or to order the Vice-Consul to pay her temporary alimony, *pendente lite.*

2. The Supreme Court of Ohio erred in finding and holding that the Constitution of the United States and Section 256, Paragraph 8 of the United States Judicial Code does not deprive state courts courts of jurisdiction of divorce proceedings against vice-consuls.

3. The Supreme Court of Ohio erred in sustaining the demurrer of the respondents to the petition of the petitioner for writ of prohibition.

## SUMMARY OF THE ARGUMENT.

**Point I.** Under Article III, Section 2 of the Constitution of the United States, Section 256 of the United States Judicial Code is constitutional;

**Point II.** Section 256, Paragraph 8 of the United States Judicial Code, gives jurisdiction to the courts of the United States and excludes jurisdiction of state courts in all suits and proceedings against vice-consuls, including actions and proceedings for divorce and alimony, or for temporary alimony. The statute is so clear and unambiguous that it should not be altered by interpretation so as to be held not to cover divorce and alimony proceedings and actions. If no remedy exists in the federal courts it

is because Congress in its discretion has not desired to provide a remedy, and it would not justify an alteration of the statute by judicial interpretation.

## ARGUMENT.

### POINT I. UNDER ARTICLE III, SECTION 2 OF THE CONSTITUTION OF THE UNITED STATES, SECTION 256 OF THE UNITED STATES JUDICIAL CODE IS CONSTITUTIONAL.

Article III, Section 2 of the Constitution quoted, *supra*, page 3 extends the judicial power of the courts of the United States to all cases in law or equity of a certain specified nature or between certain specified parties. The cases thereby covered are peculiarly federal, because unless the courts of the United States were given jurisdiction, the states would have power to dismember the Union and render its purpose futile.

Section 256 of the United States Judicial Code carries that section of the Constitution into effect and does not exceed the constitutional grant. It is, therefore, authorized by the Constitution and is constitutional.

*Martin v. Hunters Lessee*, 1 Wheat. 306 (1816);
*Plaquemines v. Henderson*, 170 U. S. 511, 517.

In this latter case it is said in the opinion of the court, page 517:

> "It cannot be doubted that each of the original states had, prior to the adoption of the Constitution, complete and exclusive jurisdiction by its judicial tribunals over all legal questions of whatsoever nature, capable of judicial determination, and involved in any case within its limits between parties over whom it could exercise jurisdiction.
>
> "If it was intended to withdraw from the states authority to determine by its courts, all cases and controversies to which the judicial power of the United

States was extended, *and of which jurisdiction was not given to the national courts exclusively,* such a purpose would have been manifested by clear language. Nothing more was done by the Constitution than to extend the judicial power of the United States to specified cases and controversies; *leaving to Congress to determine whether the courts to be established by it from time to time should be given exclusive cognizance of such cases or controversies, or should only exercise jurisdiction concurrent with the courts of the several states.*"

The Supreme Court of Ohio does not, in its opinion, question the constitutionality of Section 256 of the United States Judicial Code.

**POINT II. SECTION 256 PARAGRAPH 8 OF THE UNITED STATES JUDICIAL CODE GIVES JURISDICTION TO THE COURTS OF THE UNITED STATES OF ALL SUITS AND PROCEEDINGS AGAINST VICE-CONSULS AND EXCLUDES STATE COURTS FROM JURISDICTION OF ACTIONS FOR DIVORCE AGAINST VICE-CONSULS.**

Paragraph 8 of Section 256 of the United States Judicial Code, quoted, *supra*, page 3, provides that the jurisdiction of the courts of the United States shall be exclusive of the courts of the several states in all suits and proceedings against vice-consuls. There is no more comprehensive term than "all." All means "every." Certainly an action for divorce is a proceeding and suit. A proceeding or action for divorce or alimony against a vice-consul is therefore one which is excluded from the jurisdiction of the courts of the several states.

The language of Section 256 and Paragraph 8 thereof of the United States Judicial Code is so clear and unambiguous that there is no room for judicial interpretation. Nevertheless the Supreme Court of Ohio proceeds in its opinion to interpret it as not excluding state courts of juris-

diction of divorce proceedings. The only reason assigned by the Supreme Court of Ohio in its opinion is based upon the assumption that otherwise the wife of a vice-consul would have no forum in which she could obtain such relief.

Even if the conclusion of the Supreme Court of Ohio were correct, that if state courts have no jurisdiction of divorce proceedings against vice-consuls, the wives of vice-consuls have no forum in which to obtain relief, that is no justification for judicial legislation adding to such a clear and unambiguous federal statute as Section 256 of the United States Judicial Code. Since the statute is constitutional and within the powers of Congress, the courts have no right to question its wisdom. Hardship, under statutes, within the power of Congress to enact, has been many times held by this Court to constitute no reason for judicial legislation.

*Ladew v. Tennessee Copper Co.*, 179 Fed. 215 (Affirmed 218 U. S., 357 and 369), Opinion page 252:

> "*The construction and interpretation of statutes cannot extend to amendment or legislation. U. S. v. Fisk*, 3 Wall. 445, 448, 18 L. Ed. 243; *Petri v. Creelman Lumber Co.*, 199 U. S. 487, 495, 26 Sup. Ct. 133, 50 L. Ed. 281. *Nor can considerations of hardship justify a strained construction of the law as written. Jos. Schlitz Brewing Co. v. U. S.*, 181 U. S. 584, 589, 21 Sup. Ct. 740, 45 L. Ed. 1013; *St. Louis, I. M. & S. R. Co. v. Taylor*, 210 U. S. 281, 28 Sup. Ct. 616, 52 L. Ed. 1061. 'The remedy, if any be required, is in Congress.' *Ex-parte Girard*, 3 Wall. Jr., 263, 10 Fed. Cas. 436, Fed. Cas. No. 5,457."

The reasons which prompted the framers of the Constitution to extend the judicial power of the United States to all cases affecting ambassadors and consuls, apply to divorce proceedings against ambassadors and consuls just as much as to other suits and proceedings. A vice-consul is a representative of a sovereign of equal dignity with the

United States. The foreign sovereign thus represented may have peculiar laws relating to domestic relations. It is the right of that sovereign under principles of comity between nations to have its representatives free from embarrassment by any kind of a suit or proceeding in the land of the host. No state court should have the power to draw the United States into complications with a foreign sovereign and such complications might result from a divorce proceeding just as readily as from any other kind of a suit or proceeding.

This Court long ago decided that consular representatives are exempt from all suits and proceedings in the state courts. *Davis v. Packard,* 7 Pet. 276 (1834). The decision in that case was under an earlier form of this same statute which only differs from the present statute in that its excepted a few specific criminal matters. It is said in the opinion of this Court in that case:

> (Page 280) "As an abstract question it is difficult to understand on what ground a state court can claim jurisdiction of civil suits against foreign consuls."
>
> (Page 285) "The act of Congress is general, extending to *all* suits against consuls."

At page 283 of the opinion the court held that the privilege and immunity is not personal to the consul, but is a privilege of the government which he represents. The Court of Appeals of New York in the *Valario* case cited below, held it is also a privilege of the Government of the United States. It is a privilege which he cannot waive.

This question has been decided by the courts of New York and Pennsylvania contrary to the opinion and decision of the Supreme Court of Ohio in this cause.

In *Higginson v. Higginson,* 158 N. Y. Sup. 92, it was held that under this act of Congress the courts of New York have no jurisdiction over an action for separation brought

by the wife of the consul for the Republic of Peru against the consul in a New York court.

The reasons for excluding state courts from jurisdiction over consuls and other representatives of foreign governments is ably stated by the highest court of New York in the case of *Valario v. Thompson,* 7 N. Y., 576, where in the opinion at page 580, it is said:

> "The object of this exclusion was to keep within the control of the federal government, and subject to the authority of its courts, all cases and contingencies which might in any degree affect our foreign relations. The United States Government has an interest in maintaining this exclusive jurisdiction for the purpose of preventing it from being involved in controversies with foreign powers without its consent and for acts not its own. But this is a matter of internal regulation between the general government and the several states, over which foreign governments have no control. The exemption of a consul from liability to be sued in a state court, if it can be called a privilege, is not the privilege of the consul or his government, but of the United States Government; and therefore it cannot be renounced by the consul."

A Pennsylvania court has also held that the state courts of that state have no jurisdiction in suits and proceedings against consuls and vice-consuls. *Mannhardt v. Soderstrom,* 4 Binney 138. We also rely upon:

*Sagory v. Wissman* (D. C. N. Y. 1868), Fed. Cas. No. 12227;

*Griffin v. Domingues,* 9 N. Y. Super. Ct. (2 Duer) 656 (1853);

*Sartori v. Hamilton,* 13 N. J. Law (1 J. G. Green) 107 (1832);

*Opinions of Attorney-General of the United States,* V. 1, page 406, (1820).

**CONCLUSION.**

Thus it appears that the Supreme Court of Ohio has decided a federal question of substance contrary to the constitution and laws of the United States. The question was presented in the pleadings and passed upon in the opinion of the court contrary to the contentions of the petitioner. Unless this Court reviews said decision of the Supreme Court of Ohio, the rights, privileges and immunities of the Vice-Consul under the constitution and laws of the United States will be jeopardized. The interpretation of Section 256, Paragraph 8 of the United States Judicial Code will not be uniform throughout the United States. International complications might result. The cause, therefore, presents a question of great public and general interest. We, therefore, respectfully submit that the prayer of the petitioner should be granted.

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